RATNAMBIKAI SEEVARATNAM

v.

GOVERNMENT OF THE STATE OF PAHANG

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH CJ (MALAYA)
ABDUL HAMID OMAR FJ
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 2 OF 1980]
13 JUNE 1981

PUBLIC SERVANTS: *Termination of Service - Temporary officer on monthly basis - Re-appointment on temporary month to month basis - Colourable termination - Whether amounting to dismissal - Applicability of reg. 47(a) Cap. D, General Orders 1968 - Right to be heard - Whether termination null and void - Whether termination of services in accordance with terms and conditions of employment - Alternative course immaterial - Backdating notice of termination - Motives for termination irrelevant when termination under terms and conditions of employment.*

The appellant was employed as a temporary stenographer on 19 August 1963 in the JKR Pahang on a month to month basis. She continued to serve the government until her services were terminated effective from 1 April 1969.

The appellant contended that the purported termination was a colourable termination amounting to dismissal and that it was, *inter alia*, irregular, wrongful and in breach of the rules of natural justice and hence null and void. It was contended that reg. 47(a) Cap. D of the General Orders 1968 applied in this case and that as the termination of her appointment was in effect a punishment on account of her questionable conduct and unsatisfactory work there had been a breach of reg. 36 Cap. D of the General Orders 1968 when its provisions were not observed.

The appellant further contended that the notice of termination dated 30 June 1969 backdated to 1 April 1969, constituted a further breach as the notice was not served during the period of appointment.

On behalf of the respondent it was submitted that the crux of the matter was whether there was a dismissal or a termination in accordance with the terms and conditions of her appointment. It was contended that the appellant was offered temporary employment on a monthly basis on the terms agreed upon.

On 12 September 1964 the appellant was re-appointed, after a day's break in service, in accordance with reg. 32(c) on a temporary month to month basis and subject to certain express terms and conditions. One of the express conditions was that the services of the appellant would be terminable at any time with, *inter alia*, one month's notice given by either party.

It was held, as a matter of fact, that the appellant did receive the letter of offer of reappointment, that she had replied thereto and had impliedly and unequivocably accepted re-employment on a temporary basis. The learned trial Judge also rightly found that at the time of the termination the appellant was not a permanent officer.

One of the terms set out in the letter of offer for re-employment expressly stated that the appellant would at all times be subject to Government General Orders relating to work, conduct and conditions of service of officers in the public service.

The crucial question was whether reg. 47(2) would necessarily apply to the present case or was it a case of termination of service in accordance with the terms and conditions of employment. If reg. 47(a) was applied, it was submitted by the appellant that since she was not given a reasonable opportunity of being heard, there was therefore a breach of that regulation and consequently such termination was null and void and of no effect.

Held:

[1] On the facts the appellant was re-employed as a temporary officer; that her re-employment was subject to express terms and conditions set out in the letter of offer.

[2] The fact that the respondent may have had an option to terminate the services in accordance with certain provisions of the General Orders in force at the relevant time did not necessarily make the termination in accordance with the terms of appointment unlawful.

[3] The termination did not attract the application of reg. 47 of the 1968 General Orders even though the respondent may have been influenced or motivated by the unsatisfactory work and conduct of the appellant when deciding to terminate her services.

[4] As the appellant failed to comply with the transfer order and failed to report for duty on 1 April 1969 at the new station in Temerloh, she had herself breached the terms of the appointment and as such had vacated her appointment. The termination notice given with retrospective effect did not at all prejudice the appellant for she herself had ceased work.

[Appeal dismissed.]

Cases referred to:

Haji Ariffin v. Government of Pahang [1969] 1 MLJ 6
P.L. Dhingra v. Union of India [1958] AIR SC 36
Government of Malaysia v. Lionel [1974] 1 MLJ 3
Mahan Singh v. Government of Malaysia [1978] 2 MLJ 133

Legislation referred to:

General Orders 1968, regs. 32(b) Cap. A, 32(c) Cap. A, 36 Cap. D, 47(a) Cap. D

For the appellant - G.T. Rajan; M/s. G.T. Rajan & Co.
For the respondent - Y.M. Tengku Baharuddin Shah (State Legal Adviser Pahang)

JUDGMENT

Abdul Hamid Omar FJ:

The appellant was employed as a stenographer in Division III on 19 August 1963 in the JKR Pahang. She got married on 10 September 1964 a year after her appointment. As a result she was offered a temporary appointment on a month to month basis. She continued to serve the Government until her services were terminated effective from 1 April 1969.

The appellant contended that the purported termination was a colourable termination amounting to dismissal. It was irregular, wrongful and in contravention of the terms and conditions of her service and contrary to the principles of natural justice and was therefore null and void, inoperative and of no effect. The appellant also contended that it is irrelevant

whether she was permanent or temporary as reg. 47(a) Cap. D of the General Orders 1968 applied. It is submitted that the termination was in effect on account of questionable conduct and unsatisfactory work, and accordingly she must under the said regulations be given a reasonable opportunity of being heard.

Mr. Rajan counsel for the appellant pointed out that on 21 April 1967 a letter was sent by Kok Ah Lok, Senior Executive Engineer, Pahang Timor, Kuantan, to the appellant stating that she had not been attending to her official duties with maximum efforts. She was warned to improve the output of work failing which she would be reported to the State Engineer with the recommendation to terminate her services.

On 14 March 1969 the State Engineer wrote to the State Secretary Pahang with whom he had spoken concerning the appellant to the effect after considering the matter at length and on investigation of the personal file, he had decided to transfer the appellant out of Kuantan.

It was in evidence that prior to the termination of the appellant's services the relationship between the appellant and her superior was not cordial and there was also a state of animosity between her and her co-employees. It is for these reasons that she has contended that the termination of her appointment was in effect a punishment. It is submitted reg. 36 Cap. D of the General Orders 1968 set out hereunder was not observed and there was therefore a breach of that regulation.

The appellant also referred to reg. 47(a) of the 1968 Regulations and contended that the penal element is not necessary on the termination under that regulation. It is the appellant's further contention that the notice of termination dated 30 June 1969 backdated to 1 April 1969 constituted a further breach. The notice was not served during the period of appointment.

On behalf of the respondent Tengku Baharuddin Shah, State Legal Adviser, Pahang submitted that the crux of the matter is whether there was dismissal or a termination in accordance with the terms and conditions of her appointment. The appellant was appointed on her first appointment subject to a probationary period of one year. The confirmation was delayed because she had not passed the required Government stenography examination of 100 w.p.m. It is the respondent's contention that the appellant was on probation at the time of her marriage and of that she was offered a temporary employment on a month to month basis on terms and conditions set out in the letter of offer. She was to commence work on 12 September 1964.

It is necessary to consider first the nature of the subsequent appointment. There seems to be no dispute that the appellant did receive the offer contained in the letter SE.PHG.SP.461(17). The learned Abdul Razak J found that in this respect she did not challenge or question the validity of the letter of offer in her subsequent dealing with the Government. The appellant merely denied the existence of the letter of offer on the ground that she did not sign the letter of acceptance embodied in the offer. Be that as it may, there is clear evidence that she wrote to Senior Executive Engineer, Kuantan on 26 September 1964 in response to the letter of offer.

In the penultimate paragraph of her letter she had this to say:

> In the circumstances, taking into consideration my previous experience, I shall be very grateful if you will kindly consider **appointing me** on the basic salary of RM281 per month. (The emphasis are mine).

In this instance there cannot be any question as to the respondent to offer the appellant re-appointment on temporary basis, one of which was that she was to commence work on 12 September 1964 after a day's break in service. Obviously the appellant knew that. In her letter of 26 December 1964 she did not at all question that right of the respondent to prescribe the commencement date which was on the second day after her marriage with a day's break in between. The significance lies in the fact that under reg. 32(b) Cap. A, there is a provision for a woman officer serving on probation to retire on marriage. Although there was no letter requiring her to resign, there was evidence however that she was required to break the service before commencing service on re-appointment. After that day's break the appellant was re-appointed in accordance with reg. 32(c) on a temporary month to month basis and subject to certain express terms and conditions. One of the express conditions was that during her period of employment, her service would be terminable at any time with one month's notice or one month's salary plus cost of living allowance in lieu and without any reason being given. The appellant would also be free to relinquish her appointment by giving one month's notice or one month's salary plus cost of living allowance.

The question essentially was one of fact whether or not she received the letter. Clearly she did for otherwise she would not have referred to this letter of offer in her reply. She gave no indication whatever that she rejected the offer. What she really wanted was an increase in the basic salary to RM281. Her request was not acceded to, nevertheless she remained in service until her termination in 1969. The fact that there was a day's break in service on account of marriage and that she was re-appointed as a temporary stenographer on a month to month basis effective from 12 September 1964 was recorded in the record of service. In these circumstances therefore the learned Judge was right in arriving at a finding that the appellant "had impliedly and unequivocably accepted re-employment as a temporary officer under the terms laid down" in the letter of offer. The learned Judge also rightly found that at the time of the termination the appellant was not a permanent officer.

The next question is whether termination of the appellant attracted the application of reg. 47. It is common ground that she was an officer in the public service as is defined in the 1968 Regulations to include temporary officers.

One of the terms set out in the letter of offer for re-employment expressly stated that the appellant would at all times be subject to Government General Orders, as may from time to time be issued relating to the work, conduct and conditions of service of officers in the public service. The 1968 Regulations were in force at the date of the termination and were therefore applicable to her. The crucial question is whether reg. 47(a) would necessarily apply to the present case or was it a case of termination of service in accordance with the terms and conditions of employment. The relevant two paragraphs of reg. 47 are reproduced hereunder:

> 47(a) Any officer may have his services terminated on grounds of unsatisfactory work and conduct which may not be dealt with by specific charges under the foregoing General Orders provided that he has been given a reasonable opportunity of being heard.
>
> (b) Where a Head of Department considers that an officer's service should be terminated in the public interest, he shall submit to the appropriate Disciplinary Authority, a full report against the officer. The Disciplinary Authority shall request the officer to show cause why his services should not be terminated and when it is satisfied, having regard to the officer's age and past services, his future usefulness and other circumstances of the case, that it is desirable in the public interest so to do, it may submit its recommendation to the Government for consideration and approval.

The appellant's contention is that the purported termination was a colourable termination amounting to dismissal and accordingly reg. 47(a) of the 1968 Regulations applied, and since she was not given a reasonable opportunity of being heard, there was therefore a breach of that regulation and consequently such termination was null and void and of no effect.

We now propose to direct our attention to the circumstances leading to the termination of the appellant's service. In the first instance there was the warning letter issued by the Senior Executive Engineer on 21 April 1967. Sometime in 1969 and prior to the date of termination, there was an incident that brought about a state of animosity between the appellant and her co-employees, and lastly there was this fact of her refusal to obey the respondent's instruction to report for duty at Temerloh.

Strictly the question in issue is whether the respondent was entitled to exercise its right to terminate the appellant's services in accordance with the terms and conditions of the appointment. If that right could lawfully be exercised, it seems immaterial that there was another course open to the respondent.

We have earlier on adumbrated that the appellant was re-employed as a temporary officer and she was such an officer at the date of the termination of her service. Granted that she was subject to General Orders from time to time issued in relation to work, conduct, etc. of officers of the public service, nevertheless the fact remains that her re-employment was subject to express terms and conditions set out in the letter of offer.

The appellant knew the express terms and conditions relating to her appointment. Indeed she knew her services could be terminated in accordance therewith and she also knew that the respondent was not obliged to give any reason for the termination. She cannot therefore complain if the respondent should exercise that right to terminate her services in accordance with such terms and conditions.

The fact that the respondent may have had an option to terminate the service in accordance with certain provisions of the General Orders in force at the relevant time did not necessarily make the termination in accordance with the terms of appointment unlawful. We see no substance in the appellant's contention that the termination had attracted the application of reg. 17 of the 1968 General Orders. The case of *Hj. Ariffin v. Government of Pahang* [1969] 1 MLJ 6, 10 seems to be in point. My learned brother Chief Justice Raja Azlan Shah (Raja Azlan Shah J as he then was) said in his judgment.

> If the Government servant is appointed to a post, permanent or temporary, on the express condition or term that the employment will be terminable on one month's notice on either side, then the Government may at any time terminate his service by serving the requisite notice. It may well be that in certain cases misconduct, inefficiency, or other disqualification is the motive which influences Government to take action under the terms of the contract, but as long as the termination is founded on the right flowing from the contract then *prima facie* the termination is not a punishment within the meaning of Art. 135(2). The motive which sets the Government machinery in motion is irrelevant (see *Shrinivas Ganesh v. Union of India*).

(See also the case of *P.L Dhingra v. Union of India* [1958] AIR SC 36, 40).

In the present case Counsel for the appellant conceded that Article 132(2) did not apply, nevertheless, he said that the termination attracted the application of reg. 47 because it was a colourable termination on ground of unsatisfactory work and conduct. It may well be the respondent was influenced or motivated by the unsatisfactory work and conduct of

the appellant when a decision was taken to terminate the services of the appellant but the heart of the matter is that the respondent was lawfully entitled to exercise the right to terminate in accordance with the express terms of the appointment, and it was immaterial that it was also open to the respondent to adopt an alternative method to terminate the appellant's services.

In support we would also refer to the case of the *Government of Malaysia v. Lionel* [1974] 1 MLJ 3 where it was held that "under the laws of Malaysia a distinction is drawn between dismissal and termination of services and there is nothing in the constitution which affects the right of the Government to terminate temporary employment in accordance with the terms of the engagement. The board could not agree with the Federal Court that reg. 36 of the General Orders was invalid and inconsistent with the constitution." Our view is that it is immaterial that there is no regulation similar to reg. 36 in the 1968 General Orders. We are concerned here with the right of the Government that flows from a contract entitling it to terminate the appointment under the terms and in accordance with that contract.

The appellant's other contention that the termination was a colourable termination amounting to dismissal is completely irrelevant for the sole reason that there is no question whatever here of any involvement of a penal element. The learned Judge in the Court below found, very properly, that:

> no evil consequence arose in the case of the plaintiff because under the terms of her appointment, she was not eligible on her termination for a pension or other form of eligibility other than what was stated in the terms of her appointment.

In *Mahan Singh v. Government of Malaysia* 2 MLJ 133, 135 Lord Diplock delivering the judgment of the Court at p. 135, speaking of *Lionel's* case, had observed:

> *Lionel's* case was one in which the first part of this requirement was satisfied; his conduct was regarded as blameworthy. But the second part of the requirement, that there should be a penal element in the consequences of his dismissal, was not. He was a temporary clerk, not on the permanent establishment, but engaged on terms under which his service could be terminated on one month's notice or salary in lieu; and this was given to him. He was treated no differently from the way he would have been if his conduct had been impeccable and the Government had wished to dispense with his services because they had no longer any need for them.

Finally the only remaining issue for us to deal with is the appellant's contention that the notice of termination of 30 June 1969 backdating the termination to 1 April 1969 was a breach of the terms of the appointment. It is pointed out that it was also not served during the period of appointment. The learned Judge found that in this particular case the appellant refused to comply with the transfer order and failed to report for duty on 1 April 1969 at the new station in Temerloh. Clearly the appellant had herself breached the terms of the appointment, in particular in the light of conditions (e) and (f) as follows:

> (e) That you are at all times subject to Government General Orders, circulars and other administrative instructions as may from time to time be issued relating to the work, conduct and conditions of service of officers in the Public Service.
>
> (f) That you will be liable to be employed in any part of the State of Pahang.

By her failure to report for duty as ordered, she in fact vacated her appointment. Although the termination notice was given with retrospective effect, it did not at all prejudice the appellant for she herself had ceased work. By her own admission, it was clear that it was for personal reasons that she refused to comply with the order.

Although we find it difficult to understand, indeed, are puzzled that the respondent had chosen to wait until that date to notify the appellant of the termination of the appointment, we however fail to see any for appellant to complain. A cause of action, indeed there was, would lie against the appellant. It was open to the respondent to make a claim against the appellant arising from the breach of the express term of appointment for her refusal to obey a lawful order.

We see no merit whatever in this appeal and we accordingly dismiss it with costs.

Also found at [1981] CLJ 125